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No. 07-569

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

JERRY FITCH, SR.,

Petitioner,

v.

JOHNNY VALENTINE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MISSISSIPPI SUPREME COURT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review the Mississippi Supreme Court's decision, upholding a long-standing state cause of action which is the only avenue against third party for a spouse who has suffered injury in his marital relationship due to the intentional actions of a third party that contributed to the abandonment of the marriage.

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INTRODUCTION

This case involves the tort of alienation of affections and whether or not punitive damages may be awarded for the malicious act of adultery Petitioner Jerry Fitch committed and was found liable for under this tort. The tort of alienation of affections and whether or not this tort should exist is solely a state issue, and adultery is not protected under the First or Fourteenth Amendment. Mississippi has chosen to continue to recognize the tort of alienation of affections and places a high importance on the institution of marriage and the family.

Punitive damages were properly awarded for the malicious acts of Petitioner Jerry Fitch and is not a deprivation of property as defined by this Court in *Campbell v. State Farm*, 538 U.S. 408 (2003).

STATEMENT OF THE CASE

Respondent, Johnny Valentine, filed a lawsuit in the Circuit Court of Marshall County, Mississippi on or about December 21, 1999, against Petitioner, Jerry Fitch alleging alienation of affection. (App. A, p. 7, ¶ 10).[1]

On or about March 30, 2005, closing arguments were heard and after deliberating, the jury unanimously awarded Johnny Valentine $642,000 in actual damages and $112,500 in punitive damages. (App. A, p. 7, ¶ 11). On April 12, 2005, Jerry Fitch filed his Motion for

1. The appendices referred to in this Brief are attached to Fitch's Petition.

Judgment Notwithstanding Jury Verdict, Motion for New Trial, and Motion for Remittitur to which Johnny Valentine responded. *Id.* Jerry Fitch then filed a reply to Johnny Valentine's response and for the first time asked the trial court to abolish the tort of alienation of affection. *Id.* As a result, Johnny Valentine filed his Motion to Strike the portion of Jerry Fitch's reply asking the trial court to abolish the tort of alienation of affection. (App. A, p. 8, ¶ 11, n.9). After hearing oral arguments, the trial court denied all of Jerry Fitch's motions. (App. A, p. 8, ¶ 11). Feeling aggrieved by the verdict and the denial of his motions, Jerry Fitch appealed to the Mississippi Supreme Court. *Id.*

The Mississippi Supreme Court continued to hold that the tort of alienation of affections in Mississippi is a valid cause of action to remedy the intentional conduct that causes a loss of consortium and that the award of punitive damages in this case did not violate the Due Process clause.[2] (App. A, p. 13, ¶ 11 and p. 34, ¶ 44). Jerry Fitch subsequently filed a motion for rehearing which was denied on April 26, 2007. (App. B, p. 73). Fitch now seeks review in this Court.[3]

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2. Jerry Fitch addressed other issues in his appeal to the Mississippi Supreme Court. These issues have not been raised with this Court and for that reason, Respondent Johnny Valentine will not address these in his Brief.

3. Respondent Johnny Valentine contends that Petitioner has failed to correctly raise anissue on appeal; one must preserve the error or they usually forfeit their opportunity to bring it before the appellate court. Petitioner Jerry Fitch failed to raise the issue regarding punitive damages and their

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REASONS FOR DENYING THE PETITION

I. THE PETITIONER FAILS TO ESTABLISH ANY CONSTITUTIONAL GROUNDS FOR THIS COURT TO GRANT HIS PETITION

Petitioner Fitch contends that the award of punitive damages for his conduct is unconstitutional under the First Amendment and the Due Process Clause of the Fourteenth Amendment. To support his argument, Petitioner mainly relies upon *Lawrence v. Texas*, 539 U.S. 558 (2003), *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) and *Campbell v. State Farm*, 538 U.S. 408 (2003).[4] None of the cases cited nor has any opinion by this Court held that adultery is constitutionally protected conduct. Petitioner cites to *Lawrence* for support; however, *Lawrence* concerns consensual homosexual activity in the privacy of one's home.

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Constitutionality. During the trial, Appellant never objected to punitive damages on the basis of Constitutionality. As further evidence that Appellant has waived the punitive damages argument, he never raised the issue of punitive damages during any of his pretrial motions nor in any of his post-trial motions did he ask the trial court to remit the punitive damages amount or for a judgment not withstanding the verdict on the issue of punitives.

4. Petitioner also cites to *Griswold v. Connecticut*, 381 U.S. 479 (1965), which concerned the use of contraceptives and found that it was a "protected interest as a right to privacy and placed emphasis on the marriage relation and the protected space of the marital bedroom". *Lawrence*, 539 U.S. at 565 (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

The *Lawrence* Court continually emphasized that the sodomy law, at issue in the case, concerned one of the most private human conduct in one of most private of places. The Court also recognized that the protection of sexual conduct in one's home caused no injury to another person.

> This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set boundaries absent injury to a person or abuse of an institution the law protects.

Lawrence, 539 U.S. at 567.[5]

Adhering to *Lawrence*, the Petitioner Fitch has no rights to intentionally cause injury to an innocent third party and to the institution of the marriage between Johnny Valentine and Sandra which the tort of alienation of affections protects. Petitioner Fitch's intentional actions of committing adultery with Respondent's, Johnny Valentine's, wife are not protected by the United State's Constitution. There is no fundamental right for Fitch to wreak havoc in the life of an innocent party, such as Respondent Johnny Valentine.

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5. Petitioner Fitch relies in part on *Roberts v. United States Jaycees*, 468 U.S. 609 (U.S. 1984). The facts in *Roberts* are significantly different from the facts of the present case. *Roberts* concerns whether or not an organization should be required to accept women as regular members. In so doing, the Court concluded that the *Roberts* case did not fall into the category of intimate human relationships. *Roberts*, 468 U.S. at 620.

Mississippi has a right as a state to protect its interest in marriage and in the family unit. The Mississippi Supreme Court has decided to continue to allow alienation of affection cases against third parties who cause the destruction and breakdown of the marital bond and family relationship. The Mississippi Supreme Court has stated the following:

> In retaining the tort, this Court has stated that "the purpose of a cause of action for alienation of affection is the 'protection of the love, society, companionship, and comfort that form the foundation of a marriage. . . .' "

(App. A, p. 11, ¶ 16).[6]

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6. In its opinion in this matter, the Mississippi Supreme Court quoted to a previous case on alienation of affections regarding the need for this tort.

> [s]hould an individual be allowed to intrude upon a marriage so such an extent as to cause it to come to an end? Does a spouse have a valuable interest in a marriage that is worthy of protection from the intruding third party? In my view, the answer to both questions is in the affirmative. *The traditional family is under such attack both locally and nationally these days that this Court should not retreat now from the sound view of the tort of alienation of affections espoused by this Court in Saunders as entitling a spouse to "protection of the love, society, companionship, and comfort that form the foundation of a marriage.* I do not believe that under the compelling facts of this particular case this Court should hold that the doctrine of alienation of

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In deciding not to abolish the tort of alienation of affections, the Mississippi Supreme Court held that:

> Therefore, in the interest of protecting the marriage relationship and providing a remedy for intentional conduct which causes a loss of consortium, this Court declines the invitation to abolish the common law tort of alienation of affections in Mississippi. Alienation of affections is the only available avenue to provide redress for a spouse who has suffered loss and injury to his or her marital relationship against the third party who, through persuasion, enticement, or inducement, caused or contributed to the abandonment of the marriage and/or the loss of affections by active interference.

(App. A, p. 13-14, ¶ 16).

Although *Bowers v. Hardwick*, 478 U.S. 186 (1986), was overruled by *Lawrence*, the Court in *Lawrence* still analyzed whether or not there was a long standing history in prohibiting homosexual conduct. *Lawrence*, 539 U.S. at 568. The United States District Court for the Middle District of Florida has applied this reasoning to the act of adultery, and it held that the First

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> affections has outlived its usefulness as a deterrent protecting the marital relationship of a husband and wife in cases where the facts clearly warrant.

(App. A, p. 57-58, ¶ 16) (emphasis in original) (internal citations omitted).

Amendment right of free association did not afford protection to a police officer who engaged in extramarital adulterous relationship. *Caruso v. City of Cocoa, Florida*, 260 F. Supp.2d 1191, 1207-08 (M.D. Fla. 2003). The district court cited to this Court as follows:

> Although the right to associate has been expanded to protect certain dating relationships, *See Wilson v. Taylor*, 733 F.2d 1539, 1544 (11th Cir. 1984), the Supreme Court has held that not every "kind of private sexual conduct between consenting adults is constitutionally insulated." *Bowers v. Hardwick*, 478 U.S. 186, 191, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986). Rather, insofar as the Due Process Clause of the Fourteenth Amendment is concerned, only those associations that are "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" are entitled to heightened judicial protection. *Id.* at 191-192, 106 S.Ct. 2841. Applying the aforementioned formulations, the Supreme Court rejected the argument that the Due Process Clause of the Fourteenth Amendment protects the rights of homosexuals to engage in acts on consensual sodomy. *See id.* at 192-194, 106 S.Ct. 2841.

Caruso, 260 F. Supp.2d at 1207.

The District Court found that "proscriptions against adultery have ancient roots." *Id.* Contrary to Petitioner's contentions in attacking the constitutionality of his conduct, he is seeking this Court to state that adultery

is constitutionally protected and to abolish the tort of alienation of affections in all seven states that recognize this tort. Adultery is not constitutionally protected.

> In light of the historical treatment of adultery, this Court will apply the reasoning of *Bowers* to this case, and follow the Sixth Circuit's well-reasoned opinion in *Marcum v. McWhorter*, where the Court of Appeals rejected the theory that the First Amendment protects extramarital affairs on the grounds that the right "to engage in an intimate sexual relationship with the spouse of another cannot be said to be either deeply rooted in this Nation's history and tradition or implicit in the concept of ordered liberty." *Id.* at 642. "Adulterous conduct is the very antithesis of marriage and family" and, therefore, "such behavior cannot be compared to any of the fundamental matters of personal choice that lie at the core of traditional notions of individual liberty."

Id. at 1208.

The punitive damages award issued against Petitioner Fitch was for unlawful conduct–the act of adultery. At least three parties are affected by the act of adultery. In our case, the three parties are Johnny and Sandra Valentine, the married couple, and Jerry Fitch, the intruder into a marital relationship. All three parties are affected by the adulterous relationship between Sandra and Petitioner Fitch. The act of adultery is more than a private act between Petitioner Fitch and Sandra;

it is a public act due to the involvement of Johnny Valentine and the innocent minor child.

Not only is adultery not protected by the Constitution, it is also prohibited by laws of the State of Mississippi.

> If any man and woman shall unlawfully cohabit, whether in adultery or fornication, they shall be fined in any sum not more than five hundred dollars each, and imprisoned in the county jail not more than six months; and it shall not be necessary, to constitute the offense, that the parties shall dwell together publicly as husband and wife, but it may be proved by circumstances which show habitual sexual intercourse.

Miss. Code Ann. § 97-29-1.

Adultery is also grounds for divorce in many states, including Mississippi. See Miss. Code Ann. § 93-5-1. If adultery is constitutionally protected, as Petitioner Fitch claims, this would call into question whether or not a state could use adultery as grounds for a divorce, and a spouse could not divorce another spouse for adultery.

II. THE AWARD OF PUNITIVE DAMAGES FOR UNLAWFUL CONDUCT IS CONSTITUTIONAL AND COMPLIES WITH THE STANDARDS ANNOUNCED BY THIS COURT

The Mississippi Supreme Court has held that punitive damages "are assessed as a warning and example to deter not only the offender but others similarly situated from committing like offenses in the future." *Sudeen v. Castleberry*, 794 So. 2d 237, 249 (Miss. Ct. App. 2001). "[U]nder Mississippi law . . . [punitives] are to be awarded as punishment for the defendant's wrongdoings so that others may be deterred from similar offenses." *Gordon v. Nat'l States Ins. Co.*, 851 So. 2d 363, 366 (Miss. 2003) (citing *Ciba-Geigy Corp. v. Murphree*, 653 So. 2d 857, 874 (Miss.1994)).

There is no Mississippi case nor case by the U.S. Supreme Court providing that punitive damages are prohibited in an alienation of affection or loss of consortium action. See *Gorman*, 792 So.2d at 315-316. In fact, the Mississippi Supreme Court has recognized punitive damages as proper relief in alienation of affection cases since *Brister v. Dunaway*, 115 So. 36 (Miss. 1928) and has never intimated that the law has changed. In *Bland v. Hill*, 735 So. 2d 414 (Miss. 1999), the Mississippi Supreme Court considers the issue of punitive damages in an alienation of affection case.[7]

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7. The Mississippi Supreme Court cited to *Walter v. Wilson*, 228 So. 2d 597 (Miss. 1969) wherein it stated that:

> The modern trend of authority in the case of alienation of affection is that before the trial judge

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As required by Miss. Code Ann. § 11-1-65 and by the Mississippi Supreme Court in *Walter v. Wilson*, 228 So. 2d 597 (Miss. 1969), Petitioner Fitch did act with actual malice by committing adultery. The necessary elements were present for the jury to determine whether or not to grant punitive damages in this case.

The punitive damages award in this case does not violate any of the due process cases rendered by the United States Supreme Court. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 568 (1996). Nor does this award of punitive damages violate any of this Court's due process cases. See *Campbell*, 538 U.S. 408. The *Campbell* Court stated that only when an award is grossly excessive does it constitute an arbitrary deprivation of property and furthers no legitimate purpose. *Id.* at 417. This award of punitive damages not only punishes Petititoner Fitch for his wrongdoings, it also deters him and other citizens of this State from destroying a marriage by alienating the affections of a spouse. This purpose conforms with the

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> warranted and submitted to the jury the question of punitive damages on account of alienation of affections, as distinguished from criminal conversations, the testimony must show that the acts of the defendant in alienating the affection of the spouse were done with malice or that there were circumstances or aggravation. . . .

Bland, 735 So. 2d 420-21 (citing *Walter*, 228 So. 2d at 598)). Since there was no evidence of actual malice as evidenced by actual adultery in *Bland*, the trial court correctly decided that it was not a case warranting punitive damages. However, the case sub judice is substantially different than *Bland*.

purposes of punitive damages as outlined by this Court in other cases.

Under the holding in *Campbell*, Mississippi can punish a defendant for unlawful conduct, which as shown above, adultery clearly is unlawful. A rational basis exists for the punitive damages award. Petitioner Fitch's malicious acts were not private nor consented to by Johnny Valentine. Furthermore, the award of punitive damages in this case was less than one-fifth of the actual damages award, and this minimal award for punitive damages meets the standard announced by this Court in *Campbell.*

CONCLUSION

This Court should deny Jerry Fitch, Sr.'s Petition for Writ of Certiorari. This case only involves state law, and no constitutional issues have been properly raised by the Petitioner Fitch. Therefore, there is no basis for the Supreme Court of the United States to even entertain a Writ of Certiorari by the Petitioner. Additionally, the act of adultery is not protected intimate association, and the award of punitive damages in this case was constitutional.

Respectfully submitted,

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